

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.08.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Writ Petition No.19378 of 2003 and
W.P.M.P.No.24191 of 2003

M/S.M.R.Mini Colour Lab
represented by L.Narayanan
Proprietor, 21, Bharatidasan
Road, Chennai - 18

Appellant

v.

1.The Tamil Nadu Taxation
Special Tribunal, Singaravelan
Maligai, Chennai - 1

2.The Sales Tax Appellate Tribunal
(Main Bench), Chennai - 104

3.The Deputy Commercial Tax Officer
Mandavalli Assessment Circle
46, Main West Road
Chennai - 28.

Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking for the relief of issuance of a writ of certiorari to call for the records on the files of the first respondent in T.C.No.34/1999 dated 21.10.2002 and quash the same as being invalid and illegal and contrary to law.

For Petitioner : Mr.V.Srikanth
For Respondents : Mr.Haja Naziruddeen, Spl.G.P.
(Taxes)

ORDER

(Order of the Court was delivered by
K.RAVIRAJA PANDIAN, J.)

The writ petition is filed seeking for the relief of issuance of writ of certiorari to call for the records of the first respondent - Tamil Nadu Taxation Special Tribunal, Chennai relating to the order made in T.C.No.34 of 1999 dated 21.10.2002 and quash the same as being invalid and illegal and contrary to law.

2. By the impugned order, the Special Tribunal decided the revision filed by the petitioner under Section 38 of the Tamil Nadu General Sales Tax Act, (hereinafter referred to as "T.N.G.S.T.Act."), upholding the decision of the Sales Tax Appellate Tribunal dated 22.1.1997 in respect

of levy of sales tax on the turnover pertaining to the processing of photo film as outright sale for the assessment year 1991-92 made in T.A.No.230 of 1995 but deleting the penalty levied on the petitioner under Section 12(5)(iii) of the T.N.G.S.T.Act.

3. The facts of the case, which formed basis for filing the writ petition proceed as follows:

The petitioner is a colour lab engaged in the business of processing and printing of films on the negatives supplied by the customer. The petitioner is also a dealer under the T.N.G.S.T.Act on the file of the third respondent -Deputy Commercial Tax Officer, Mandavalli Assessment circle. For processing and printing the film on the negatives supplied by the customers, the petitioner had collected charges on consolidated basis. For the assessment year 1991-92, the petitioner had reported a total and taxable turnover of Rs.10,28,387/- and nil respectively. The assessing officer, the third respondent had held that the transaction represented sale of finished goods and not works contract and disallowed the claim of exemption on the entire turnover and thus determined the total and taxable turnover at Rs.10,28,387/- and further levied penalty in a sum of Rs.68,131/- by his proceedings in T.N.G.S.T.No.130286/91-92 dated 23.3.1993. The petitioner had filed an appeal to the Appellate Assistant Commissioner in A.P.No.191 of 1994. The Appellate Assistant Commissioner by his order dated 9.6.1994 confirmed the tax liability but deleted the penalty. The petitioner thereafter filed an appeal to the Sales Tax Appellate Tribunal - second respondent in T.A.No.230 of 1995 as against that portion of the order levying tax. The revenue in its turn aggrieved by the deletion of penalty filed enhancement petition in T.M.P.No.481 of 1995. The Tribunal dismissed the appeal filed by the petitioner and allowed the enhancement petition filed by the revenue in full by its order dated 22.1.1997 thereby restored the order of assessing officer. As against the same, the petitioner filed a revision in Tax Case (R) No.34 of 1999 before the first respondent - Tamil Nadu Taxation Special Tribunal constituted under Article 323A of the Constitution of India. The first respondent, while confirming the tax liability, has deleted the penalty. The correctness of the said order is now put in issue in this writ petition.

4. Mr.Srikanth, learned counsel appearing for the petitioner has contended that the question as to whether the transaction of the petitioner would represent "sale" simplicitor or not has been settled by the decision of the Supreme Court in the case of RAINBOW COLOUR LAB AND ANOTHER VS. STATE OF MADHYA PRADESH AND OTHERS reported in (2000) 118 STC 9, as not sale and consequently not exigible to tax. He further submitted that the decision of the Supreme Court in the case of ASSOCIATED CEMENT COMPANIES LIMITED VS. COMMISSIONER OF CUSTOMS reported in (2001) 124 STC 59 had only doubted the reasoning given in Rainbow Colour Lab case ((2000) 118 STC 9) that even after 46th amendment, no tax could be levied at all in respect of the transaction identical to that of the petitioner and hence it could not be said that the decision reported in Rainbow Colour Lab case ((2000) 118 STC 9) has been overruled by Associated Cement Companies case ((2001) 124 STC 59). He further contended that the issue involved in Associate Cement Companies Case (2001) 124 STC 59 was, whether drawing, designs, etc., are goods

liable to customs duty or not and did not involve activity similar or identical to that of petitioner and hence the decision in Associated Cement Companies case ((2001) 124 STC 59) cannot be regarded as a binding precedent. He further submits that the decision of the Supreme Court in Associated Cement Companies case ((2001) 124 STC 59) cannot be construed as overruling the principle stated in Rainbow Colour Lab case ((2000) 118 STC 9) in the absence of any specific finding in the later decision overruling the principle stated in Rainbow Colour Lab case ((2000) 118 STC 9). He further contended that the availability of definition of the term "works contract" in TNGST Act would not militate the issue against the petitioner in view of the decision in Rainbow Colour Lab case ((2000) 118 STC 9). He further contended that even assuming that the transaction of the petitioner is works contract, the authority could levy tax only on the materials used in the transaction under Section 3-B of the T.N.G.S.T. Act, but not on the entire transaction value. In order to bring home his contention, the learned counsel cited the following cases:

(1) PRAKASH AMICHAND SHAH VS. STATE OF GUJARAT AND OTHERS reported in AIR 1986 SUPREME COURT 468;

(2) DIVISIONAL CONTROLLER, K.S.R.T.C. VS. MAHADEVA SHETTY AND ANOTHER reported in (2003) 7 SCC 197 and

(3) STATE OF HARYANA VS. RANBIR reported in (2006) 5 SCC 167.

5. However, the learned Government Pleader appearing for the revenue submitted that of course, it is true that in the case of ASSOCIATED CEMENT COMPANIES LIMITED VS. COMMISSIONER OF CUSTOMS ((2001) 124 STC 59), it is not specifically stated by the Supreme Court that the principle laid down in Rainbow Colour Lab case ((2000) 118 STC 9) was overruled, but the expression of the Supreme Court that in their opinion the decision of Rainbow Colour Lab case ((2000) 118 STC 9) ran counter to the express provision contained in Article 366(29-A) of the Constitution as also of the Constitution Bench decision of this Court in BUILDERS ASSOCIATION OF INDIA VS. UNION OF INDIA reported in (1989) 73 STC 370 would amply make it clear that the subsequent larger Bench expressed its opinion in unequivocal manner to the effect that the opinion rendered in Rainbow Colour Lab case ((2000) 118 STC 9) is running counter. When a Larger Bench of the Supreme Court in a subsequent decision has expressed their view, which is against the view taken in Rainbow Colour Lab case ((2000) 118 STC 9), only the subsequent view would prevail and that would have to be followed by the authorities. According to him, the order impugned needs no interference in this case.

6. We heard the argument of the learned counsel on either side and perused the materials on record.

7. The fact finding authority on verification of the accounts has recorded a factual finding to the effect that the petitioner purchased colour paper used for printing the film from other State and purchased the chemical used in the process of printing locally, the petitioner collected the charges on consolidated basis of processing and printing,

major portion of the charges paid by the customer is lumpsum accounts for the colour paper and chemical. The colour papers and chemicals used by the petitioner were from the petitioner's own stock purchased from other States and inside the State and hence the whole transaction of the dealer is a sale for consideration.

8. Amongst the statutory authorities, there was no dispute about the activity of the petitioner, which are as stated above. However, there are certain discrepancies in their opinion about the treatment given to the transaction of the petitioner by the respective authorities. In order to have a clear view of the treatment of the transaction by each of the hierarchy of authorities, we are of the view that the following facts need to be mentioned.

9. The assessing officer by overruling the objections of the assessee that the turnover represents "works contract", treated the turnover as outright sale and assessed to tax at 10 percent under entry 7 of the first Schedule to the T.N.G.S.T. Act. The first appellate authority - Appellate Assistant Commissioner has also given a clear finding to the effect that he had no hesitation to hold that the transaction of the assessee has to be treated as a "sale" and not "works contract" and thus confirmed the disallowance of exemption claimed by the assessee over the turnover of Rs.10,28,387/-. The Appellate Tribunal, while narrating the facts, had fallen into error, in the sense that according to the appellate Tribunal, the first appellate authority - Appellate Assistant Commissioner took a different view and treated the turnover for assessment as "works contract". In the ultimate finding also, the Tribunal has stated that the order of the Appellate Assistant Commissioner would not hold good and the same was set aside and the finding of the assessing officer was restored. That is not correct. The Special Tribunal confirmed the finding of the Tribunal in respect of the levy of tax. Thus, all the authorities right from the assessing officer till the Special Tribunal have treated the transaction of the petitioner as an outright sale.

10. Now, let us consider the legal issue. Mr. Srikanth, learned counsel appearing for the petitioner rests his entire argument on the basis of Rainbow Colour Lab case ((2000) 118 STC 9). That was a case with identical facts. The question in that case was, whether the work done by the appellant therein would fall within the definition of "sale" under Section 2(n) of the Madhya Pradesh General Sales Tax Act, 1961, after it was amended to include works contract read with Article 366(29-A)(b) of the Constitution of India. The High Court held that photographic paper was used in the printing of positive prints by the appellant in their work, there was transfer of property in goods and to that extent, the job done by the appellants became works contract as contemplated under Article 366(29-A)(b) of the Constitution and as incorporated in Section 2(n) of the Madhya Pradesh Act. On appeal, the Supreme Court set aside the judgment of the High Court by holding that unless there was a sale and purchase of goods either in fact or deemed, which sale was primarily intended and not incidental to the contract, the transaction was in the nature of service and not works contract and in such a case, the State could not seek to impose sales tax in the

guise of expanded definition in Article Article 366(29-A)(b) read with Section 2(n). The Supreme Court further held that the work done by the appellants was only in the nature of service contract not involving the sale of goods and therefore the appellants were not liable to sales tax. In that case, it was further held that all that had happened in law after 46th amendment and the judgment of the Supreme Court in Builders Association case (73 STC 370) was that it was now open to the States to divide the works contract into two separate contracts by legal a fiction (1) contract for the sale of goods involved in the works contract and (2) supply of labour and service. This division of works contract under the amended law could be made only if the contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer of property takes place as an incidence of contract of service. The amendment has not empowered the State to indulge in microscopic division of contract involving the value of the material used incidentally in such contract of service. Thus, holding, allowed the appeal. (bold supplied)

11. PRAKASH AMICHAND SHAH VS. STATE OF GUJARAT AND OTHERS reported in AIR 1986 SUPREME COURT 468 was a case in which the constitutional validity of Town Planning Scheme No.VIII (Umarwada) in respect of certain lands situated at Surat City in the State of Gujarat, published under the provisions of Bombay Town Planning Act, 1954 insofar as the said scheme pertained to the land of which the appellant therein was the lessee, was questioned. In that case, the Supreme Court observed that all the arguments based on Articles 14 and 31(2) of the Constitution against that Act were repelled by the Constitution Bench in the STATE OF GUJARAT VS. SHANTILAL MANGALDAS, (AIR 1969 SC 634). The Supreme Court while answering the contention that in subsequent decisions, the Supreme Court has taken a different view by referring to R.C.COOPER VS. UNION OF INDIA, (AIR 1970 SC 564) and KESAVANANDA BHARATI VS. STATE OF KERALA (AIR 1973 SC 1461) and STATE OF KARNATAKA VS. RANGANATHA REDDY (AIR 1978 SC 215), has observed that while considering such submission care must be taken. What was under consideration was not a statute or a legislation, but a decision of the Court. A decision ordinarily was a decision on the case before the Court while the principle underlying the decision would be binding as a precedent in a case, which came up for discussion subsequently. Hence, while applying the decision to later case, the Court, which was dealing with it, should carefully try and ascertain the true principle laid down by the previous decision. The decision often takes its colour from the question involved in the case in which it was rendered. The scope and authority of the precedent never be expanded unnecessarily beyond the needs of a given situation. The Supreme Court further observed in that case that the expressions like 'virtually overruled' or 'in substance overruled' were expressions of inexactitude. In such circumstances, it was the duty of the Court to consider the effect of the precedent in question to read it over again and to form its own opinion instead of wholly relying upon the gloss placed on it in some other decisions.

12. In the case of DIVISIONAL CONTROLLER, K.S.R.T.C. VS. MAHADEVA SHETTY AND ANOTHER reported in (2003) 7 SCC 197 also, a similar view has been taken in paragraph No.23, which reads as follows:

"23. The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority."

13. In the case of STATE OF HARYANA VS. RANBIR reported in (2006) 5 SCC 167, it was held that a decision is an authority for what it decided and not what could logically be deduced therefrom; that the distinction between a dicta and obiter was well known; Obiter dicta was more or less presumably unnecessary to the decision. It might be an expression of a viewpoint or sentiments, which has no binding effect. An 'obiter dictum' as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it, but not arising in such manner as to require a decision. Such a obiter may not have a binding precedent. But it could not be denied that it is of considerable weight.

14. We considered the case laws in detail and we are of the considered view that none of the above decisions relied on by the petitioner to contend that Associated Cement Companies case ((2001) 124 STC 59) is only an obiter and rendered in a case, where it was not required to be decided, would support the case of the petitioner.

15. Let us consider the contentions having in mind the observation of the Supreme Court in the Constitution Bench judgment of Prakash Amichand Shah case (AIR 1986 SUPREME COURT 468) (referred supra), to the effect that if a contention is raised that particular judgment is an obiter or not specifically overruled then it shall be the duty of the Court to consider the effect of the precedent in question to read it over again and form an opinion instead of relying upon the the gloss

placed on it in some other judgment.

16. In Associated Cement Companies case (2001) 124 STC 59, the question for consideration was whether drawings, diskettes, manual, etc., relating to machinery or industrial technical were goods, which could be subjected to customs duty on the transaction valued at the time of their import under the Customs Act, 1962. In that context, the appellant therein contended relying on several decisions relating to levy of sales tax that in contracts for supply of service, there is no sale of goods and as such no customs duty could be imposed on intellectual property which was obtained. The Supreme Court in that case considered in detail the decisions of ASSISTANT SALES TAX OFFICER VS. B.C.KAME (1977) 39 STC 237 (SC), STATE OF TAMIL NADU VS. ANANDAM VISWANATHAN (1989) 73 STC 1 (SC), EVEREST COPIERS VS. STATE OF TAMIL NADU (1996) 103 STC 360 (SC), as also the decision in Rainbow Colour Lab's case (2000) 118 STC 9 on which the petitioner built the edifice of his case, and held as follows:

"24. All the aforesaid decisions related to the period prior to the Forty-sixth Amendment of the Constitution when Article 366(29-A) was inserted. At that time in the case of a works contract it was held that the same could not be split and the State Legislature had no legislative right to seek to levy sales tax on a transaction which was not a sale simpliciter of goods. Rainbow Colour Lab v. State of Madhya Pradesh (2000) 118 STC 9 (SC) : (2000) 2 SCC 385 was, however, a case relating to the definition of the word "sale" in the M.P. General Sales Tax Act, 1958 after its amendment consequent to the insertion of Article 366(29A). The question there was whether the job rendered by a photographer in taking photographs, developing and printing films would amount to works contract for the purpose of levy of sales tax. This Court held that the work done by the photographer was only a service contract and there was no element of sale involved. After referring to earlier decisions of this Court, it was observed at page 14 of STC (391 of SCC) as follows:

" 15 . Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which sale is primarily intended and not incidental to the contract, the State cannot impose sales tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29-A)(b) read with Section 2(n) of the State Act. On facts as we have noticed that the work done by the photographer which as held by this Court in Kame case 2 is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent State cannot be sustained."

25. Even though in our opinion the decisions relating to levy of sales tax would have, for reasons which we shall presently mention, no application to the case of levy of customs duty, the decision in Rainbow Colour Lab case (2000) 118 STC 9 (SC) : (2000) 2 SCC 385 requires consideration. As a result of the Forty-sixth Amendment, sub-article (29-A) of Article 366 was inserted as a result whereof, tax on the sale or purchase of goods was to include a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Taking note of this amendment this Court in Rainbow Colour Lab (2000) 118 STC 9 (SC) : (2000) 2 SCC 385 (page 12 of STC) (pages 388-389 of SCC) observed as follows:

"9 . Prior to the amendment of Article 366, in view of the judgment of this Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd (1958) 9 STC 353, the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the 46th Amendment and the judgment of this Court in Builders' case (1989) 73 STC 370 is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service. The amendment, referred to above, has not empowered the State to indulge in a microscopic division of contracts involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is what was the dominant intention of the contract. Every contract, be it a service contract or otherwise, may involve the use of some material or the other in execution of the said contract. The State is not empowered by the amended law to impose sales tax on such incidental materials used in such contracts."

26. In arriving at the aforesaid conclusion the Court referred to the decision of this Court in Hindustan Aeronautics Ltd. v. State of Karnataka (1984) 55 STC 314: (1984) 1 SCC 706 and Everest Copiers (1996) 103 STC 360. But both these cases related to the pre-Forty-sixth Amendment era where in a works contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to

empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. The conclusion arrived at in Rainbow Colour Lab case (2000) 118 STC 9 (SC) : (2000) 2 SCC 385, in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in Builders' Assn. of India v. Union of India (1989) 73 STC 370 : (1989) 2 SCC 645."

(bold supplied)

17. The Supreme Court however found in the said judgment that the provisions of Customs Act and that of the Sales Tax Act were different and therefore its decision relating to levy of sales tax in cases of works contract will have no application in that case by observing thus

"32. In the sales tax cases referred to hereinabove no doubt the question which arose was whether in a works contract, where there was a supply of materials and services in an indivisible contract, but there the question had arisen because the States' powers prior to the Forty-sixth Amendment to the Constitution, were not entitled to bifurcate or split up the contract for the purpose of levying sales tax on the element of moveable goods involved in the contract. Apart from the decision in Rainbow Colour Lab case (2000) 118 STC 9 (SC) : (2000) 2 SCC 385, which does not appear to be correct, the other decisions cited related to the pre-Forty-sixth Amendment period."

(bold supplied)

18. In view of the categorical finding arrived at on great deal of discussion, the finding so arrived at cannot be regarded as obiter and it can only be regarded as an observation by the Supreme Court on a point raised, considered in detail and decided after examination. Such a finding would be binding as a law declared under Article 141 of the Constitution of India, even though it was not necessary for deciding the case before it. Where a larger Bench of the Supreme Court deliberately and with the intention of setting the law, pronounces upon a question by holding that a decision of a smaller Bench is contrary to the decision of a Constitution Bench and therefore not correctly decided, such pronouncement is the law declared by the Supreme Court within the meaning of Article 141 and binding on all courts, even if such pronouncement was not necessary for deciding the case before it.

19. A two judges Bench of the Supreme Court in C.K.JIDHEESH VS. UNION OF INDIA (2006) 144 STC 322 dismissed the writ petition filed under Article 32 of the Constitution of India. In the said writ petition, the validity of the letter of the Finance Ministry clarifying Section 67 of the Finance Act, 1994, as amended in 2001, to the effect that the value of taxable service in photography service was the gross amount charged for the service rendered, was challenged. In that case, while answering the contention that ratio of the Rainbow Colour Lab case (2000) 118 STC 9 (SC), which held the printing of photograph from negative was service contract has been doubted by the Larger Bench in Associated Cement Companies case (2001) 124 STC 59, the Supreme Court held thus:

"13. We are unable to accept this submission. In Associated Cement Companies' case (2001) 4 SCC 593 the question was whether or not custom duty could be levied on drawings, designs, diskettes, manuals, etc. The argument there was that these were intangible properties and not goods as defined in Section 2(22) of the Customs Act. The question of levy of service tax did not arise in that case. The observations relied upon are mere passing observations and do not overrule Rainbow Colour Lab case (2000) 118 STC 9 (SC) : (2000) 2 SCC 385 "

(bold supplied)

20. However, a Bench consisting of three Judges in the case of Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 145 STC 91 : (2006) 3 SCC 1, wherein the point for consideration was in the nature of transaction by which mobile telephone connections are enjoyed, is it a sale or is it a service or is it both, with reference to the sales tax legislation for the levy of sales tax. The Supreme Court considering Rainbow Colour Lab case (2000) 118 STC 9 (SC) : (2000) 2 SCC 385, Associated Cement Companies' case (2001) 4 SCC 593 and C.K.JIDHEESH VS. UNION OF INDIA (2006) 144 STC 322, ruled as follows:

"47. In Rainbow Colour Lab v. State of M.P. (2000) 2 SCC 385, the question involved was whether the job rendered by the photographer in taking photographs, developing and printing films would amount to a "works contract" as contemplated under Article 366(29-A)(b) of the Constitution read with Section 2(n) of the M.P. General Sales Tax Act for the purpose of levy of sales tax on the business turnover of photographers.

48. The Court answered the questions in the negative because, according to the Court:

"Prior to the amendment of Article 366, in view of the judgment of this Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1958) 9 stc 353: AIR 1958 SC 560, the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after

the Forty-sixth Amendment and the judgment of this Court in Builders' case (1989) 2 SCC 645 is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service. ... What is pertinent to ascertain in this connection is what was the dominant intention of the contract. ... On facts as we have noticed that the work done by the photographer which as held by this Court in Assistant Sales Tax Officer v. B.C. Kame (1977) 1 SCC 634 is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent State cannot be sustained."

49. This conclusion was doubted in Associated Cement Companies Ltd. v. Commissioner. of Customs (2001) 4 SCC 593 saying:

"The conclusion arrived at in Rainbow Colour Lab case (2000) 2 SCC 385, in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in Builders' Assn. of India v. Union of India (1989) 2 SCC 645"

50. We agree. After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005 C.K. Jidheesh v. Union of India (2005) 8 SCALE 784 held that the aforesaid observations in Associated Cement (2001) 124 STC 59 (SC) were merely obiter and that Rainbow Colour Lab (2000) 2 SCC 385 was still good law, it was not correct. It is necessary to note that Associated Cement 26 did not say that in all cases of composite transactions the Forty-sixth Amendment would apply."

(bold supplied)

21. The above Judgment without any uncertain terms answered that Associated Cement Companies' case (2001) 124 STC 59 = (2001) 4 SCC 593 is correct in saying Rainbow Colour Lab case (2000) 118 STC 9 (SC) runs counter to the provisions contained in Article 366(29-A) as also of the Constitution Bench decision in Builders Association case ((1989) 73 STC

370). The judgment further ruled that the observation in C.K.JIDHEESH VS. UNION OF INDIA (2006) 144 STC 322 to the effect that the observation in Associated Cement Companies' case (2001) 4 SCC 593 were mere obiter and that Rainbow Colour Lab case (2000) 118 STC 9 (SC) still hold good law was not correct. Thus, the entire controversy is now settled by holding that Associated Cement Companies' case (2001) 124 STC 59 is holding the field.

22. Facing with the above judgment, learned counsel for the petitioner sought to make an argument that though Bharat Sanchar Nigam Limited (in short "BSNL") case ((2006) 145 STC 91)) was decided by Larger Bench of three Honourable Judges of the Supreme Court and one of the Honourable Judges (Hon'ble Justice A.R.Lakshmanan) rendered a separate judgment. Hence, the main judgment rendered in that case cannot be regarded as one rendered by three Honourable Judges. The said argument was made to support the view taken in C.K.JIDHEESH VS. UNION OF INDIA (2006) 144 STC 322.

23. We are unable to agree with the submission made by the counsel for the reason that though a separate judgment was rendered by one of the Honourable Judges of the Supreme Court in BSNL case (145 STC 91), it is only a concurring judgment and not a dissenting judgment dissenting with any of the reasons given in the main judgment. There is no trace in the separate judgment of the Honourable Judge (A.R.Lakshmanan,J) to counter the reasoning given in the main judgment. Further the judgment in the said BSNL case (145 STC 91) was rendered on 2.3.2006 and that of C.K.Jidheesh case ((2006) 144 STC 322) was rendered on 27.10.2005. Even assuming for a moment, without accepting the contention above raised, the latest judgment, which considered the earlier judgment would be binding. Hence, the contention raised by the learned counsel for the petitioner is rejected, which leaves us to decide the last question as to whether the authorities are right in taxing the transaction as an outright sale.

24. Pursuant to the 46th amendment, the Tamil Nadu State Legislature has amended the definition of "sale" under Section 2(n) including the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. A separate charging section Section 3-B has also been incorporated with the marginal heading of "Levy of tax on the transfer of goods involved in works contract".

25. The activity of the petitioner, as already discussed, which is developing and taking the positive prints from the negative, is a composite transaction of sale and service. The authorities below have miserably erred in treating the transaction as an outright sale under Section 3 of the T.N.G.S.T.Act, as the transaction is complex one containing element of sale of property in goods and also service and skill. Even if the dominant intention of the contract is printing positive photographs from the negative, it would amount to only "works contract" and the transaction could be assessed to tax only under section 3-B of the T.N.G.S.T.Act. Hence, the orders impugned right through are hereby set aside with a direction to the authorities to make the assessment under section 3-B of the T.N.G.S.T.Act.

26. Accordingly, the writ petition is disposed of. However, there is no order as to costs. Consequently, the connected W.P.M.P. is closed.

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Deputy Registrar
The Tamil Nadu Taxation
Special Tribunal, Singaravelan
Maligai, Chennai - 1
- 2.The Sales Tax Appellate Tribunal
(Main Bench), Chennai - 104
- 3.The Deputy Commercial Tax Officer
Mandavalli Assessment Circle
46, Main West Road
Chennai - 28.

+ 1 cc to Mr.C.Venkatraman Advocate SR.NO.48699
+ 1 cc to Spl. Govt.pleader SR.NO.49274

SSK (Co)
RD 17.8.07

सत्यमेव जयते

Order
in W.P.No.19378 of 2003

WEB COPY